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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL OTILIO RUIZ, Defendant and Appellant.	E048044 (Super.Ct.No. INF060663) OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Daniel Otilio Ruiz appeals from judgment entered following jury

convictions for second degree murder of Melvin Chavez (Pen. Code, § 187, subd. (a)[1]; count 1); driving under the influence of alcohol and causing bodily injury to Carlos Lopez (Veh. Code, § 23153, subd. (a); count 2); and driving with a blood alcohol level of .08 percent or more and causing bodily injury to Carlos Lopez (Veh. Code, § 23153, subd. (b); count 3). The jury also found true great bodily injury enhancements as to counts 2 and 3 (§ 12022.7, subd. (a)). The trial court sentenced defendant to 15 years to life in prison.

1. Facts

As Michael Geraghty was driving on Highway 111 near Rancho Mirage on August 26, 2007, at 1:30 a.m., he noticed a white convertible with the top down, swerving across three lanes of traffic. Geraghty followed the car. At the next intersection, Geraghty turned left behind the white convertible, which had traveled over the center line into oncoming traffic.

Geraghty called 911 while continuing to follow the car. He told the dispatcher there were four males in the car and described the car. At trial, Geraghty testified he was certain there actually were only three males in the car.

When the convertible turned into an apartment complex on Monterey Avenue, Geraghty told the 911 dispatcher it appeared the driver of the car had probably arrived home. Geraghty lost sight of the car and ended the 911 call.

Shortly thereafter, Geraghty saw the white convertible traveling on Monterey,

[1] Unless otherwise noted, all statutory references are to the Penal Code.

making a right turn onto Fred Waring Drive. Geraghty again called 911 to report the car was back on the road. Geraghty lost sight of the car after it turned onto Fred Waring Drive and traveled eastbound toward Cook Street. Geraghty told the dispatcher it appeared that the driver saw him following and sped off. Geraghty believed the driver was drunk because he was driving extremely dangerously, swerving all over the road, and almost collided head-on into another vehicle.

Wendelyn Melton testified that, at about this same time, she was stopped facing south in the left turn lane on Cook Street at the intersection with Fred Waring Drive. While waiting for the green arrow, she saw a white convertible traveling 60 to 70 miles per hour, eastbound on Fred Waring Drive. The car ran a red light and crashed into a Nissan sedan traveling north through the intersection on Cook Street. The convertible struck the Nissan's left front side, spun slightly, and then drove over the sidewalk and crashed into a wall.

Within a few minutes of the accident, the paramedics and police arrived. They found defendant, Melvin Chavez, and Carlos Lopez in defendant's car. Lopez was defendant's best friend. Chavez was Lopez's brother. The three men initially appeared all to be unconscious. They were all wearing seatbelts. Within about five minutes, defendant and the rear passenger, Lopez, began falling in and out of consciousness. The front passenger, Chavez, was slumped over and remained unconscious, with a gash on his forehead.

The three men were transported to the hospital. On the way there, defendant said they had been stopped on the side of the road, smoking and drinking. He claimed he had

not been driving. Later, at the hospital, defendant said he had been drinking all day and admitted he was driving at the time of the accident.

Deputy Calkins investigated the accident. He arrived at the scene at 4:00 a.m. He determined defendant's car was traveling about 90 miles per hour when it collided with the Nissan, which was traveling about 19 miles per hour on a street with posted speed limits of 45 and 50 miles per hour in the area of the accident.

Lopez suffered serious abdominal injuries. Chavez died at the hospital from head injuries.

At the time of the collision, defendant's blood alcohol concentration was .20 percent. Lopez testified he thought everything was fine as they were driving right before the accident.

Calkins interviewed defendant at his home and at the sheriff's station on January 16, 2008, after defendant's arrest. Defendant admitted he was the driver at the time of the accident. He also admitted that before the accident, he had been convicted of driving under the influence (DUI). He was required to attend drunken driving classes and Alcoholics Anonymous meetings. At the time of the accident, defendant was driving with a restricted license, in which he was permitted to drive only to and from first time DUI offender classes. Defendant claimed the classes did not have any effect on him.

2. Evidence of Voluntary Intoxication

Defendant contends that section 22 operates to exclude relevant evidence of voluntary intoxication, in violation of his federal constitutional due process right to present a defense. We disagree.

During a hearing on jury instructions, defense counsel requested CALCRIM No. 625, an instruction on voluntary intoxication. CALCRIM No. 625 states: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant <*insert other specific intent required in a homicide charge or other charged offense*>.] [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

The trial court rejected CALCRIM No. 625 under section 22, subdivision (b) and *People v. Martin* (2000) 78 Cal.App.4th 1107 (*Martin*), on the ground voluntary intoxication is irrelevant where murder is based on implied malice. Defendant argues that the judgment must be reversed because, had the jury been properly instructed by giving CALCRIM No. 625, the jury likely would have found defendant guilty of a lesser offense, such as manslaughter.

Citing *People v. Whitfield* (1994) 7 Cal.4th 437, 441, 450, 452, defendant asserts that he had a right to present material exculpatory evidence of intoxication to support his defense to second degree murder. But the *Whitfield* decision, which held that evidence of voluntary intoxication is admissible to negate malice aforethought, regardless of whether such malice was express or implied (*id.* at p. 441), was superseded in 1995, by the

Legislature amending section 22.

Section 22, as amended, states that evidence of voluntary intoxication is admissible only in establishing express malice.[2] (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1374-1375; see also *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298.) The court in *Martin, supra,* 78 Cal.App.4th at page 1114, noted that "It is clear that the effect of the 1995 amendment to section 22 was to preclude evidence of voluntary intoxication to negate implied malice aforethought." (*Martin, supra,* 78 Cal.App.4th at p. 1114.) The section 22 amendment thus attempted "to differentiate between express malice aforethought and implied malice aforethought when a defendant is charged with murder and evidence of voluntary intoxication is being offered for admittance." (Review of Selected 1995 California Legislation, 27 Pacific L.J. 350, 605, fn. omitted.)

The issue presented by defendant here is whether the federal Constitution prevents the Legislature from making such a distinction in section 22 between express and implied malice, and can preclude defendant from refuting implied malice by presenting evidence of intoxication. The court in *Martin, supra,* 78 Cal.App.4th at page 1115, addressed this issue.

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[2] Section 22 states: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

In *Martin, supra,* 78 Cal.App.4th 1107, the defendant was convicted of second degree murder, gross vehicular manslaughter while intoxicated, and other related charges. (*Id.* at p. 1110.) The defendant argued that it was error for the court to instruct the jury, based on section 22, that voluntarily intoxication is not a defense and does not relieve him of responsibility for the crime of second degree murder (CALJIC No. 4.20). (*Martin, supra,* 78 Cal.App.4th at pp. 1111-1112.) The defendant in *Martin* asserted that such an instruction precluded application of the defense of intoxication in a general intent crime. (*Id.* at p. 1112.) The defendant further argued that "section 22 is unconstitutional, since it restricts the presentation of a defense that 'negates an element of the charged crime,' specifically, the 'knowledge' element for implied malice." (*Ibid.*) The *Martin* court thoroughly discussed and rejected these contentions, relying on *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff*). (*Martin* at pp. 1113-1117.)

Defendant argues that *Martin, supra,* 78 Cal.App.4th 1107 was wrongly decided because the decision is based on a fundamental misreading of *Egelhoff, supra,* 518 U.S. 37, and *Egelhoff* is distinguishable from the instant case. Defendant asserts that the Montana statute at issue in *Egelhoff* provided for across-the-board inadmissibility of intoxication evidence, because the statute applied to both implied and express malice. As a consequence, unlike section 22, the statute in *Egelhoff* had the effect of redefining the implied malice element of murder such that evidence of intoxication was no longer relevant. Section 22, on the other hand, declares only certain intoxication evidence inadmissible and thus does not redefine the implied malice element of murder. Defendant argues that therefore section 22, which excludes evidence relevant to his

defense, violates his due process rights, whereas the Montana statute redefines the element of implied malice, such that evidence of voluntary intoxication is inadmissible because it is irrelevant. We are not persuaded by this proposition.

In *Egelhoff, supra,* 518 U.S. 37, the Supreme Court considered and reversed a Montana Supreme Court decision that held (1) that evidence of the defendant's voluntary intoxication was relevant to the issue of whether he acted knowingly and purposely in killing two men and (2) the Montana statute that prevented the jury from considering such evidence violated due process because it relieved the prosecution of part of its burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. (*Id.* at p. 41.) Justice Scalia, in the plurality opinion, rejected the Montana state court ruling and held that the due process clause does not guarantee a defendant the right to present and have considered all relevant evidence. (*Id.* at pp. 42-43.) Using a historical analysis, the Supreme Court concluded that the right to introduce evidence of voluntary intoxication is not a fundamental principle of justice. (*Id.* at pp. 44-48.) The court stated: "It is not surprising that many States have held fast to or resurrected the common-law rule prohibiting consideration of voluntary intoxication in the determination of *mens rea,* because that rule has considerable justification[] -- which alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.'" (*Id.* at p. 49.) The court in *Egelhoff* thus concluded the Montana Legislature could exclude evidence of voluntary intoxication on the issue of defendant's state of mind. (*Id.* at p. 56.)

Three justices joined the lead opinion, and Justice Ginsburg concurred in the judgment. Justice Ginsburg found the statute was a redefinition of the mental element of

the offense and joined "the Court's judgment refusing to condemn the Montana statute as an unconstitutional enactment." (*Egelhoff, supra,* 518 U.S. at p. 57 (conc. opn. of Ginsburg, J.).) Justice Ginsburg further stated: "Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a 'fundamental principle of justice,' given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today. [Citations.]" (*Id.* at pp. 58-59 (conc. opn. of Ginsburg, J.).)

Defendant relies on the dissenting opinion of Justice O'Connor in which Justice O'Connor concluded the Montana statute violated due process because it unduly restricted the defendant's ability to defend against the prosecution's accusations. Justice O'Connor thus agreed with the Montana Supreme Court holding that, "keeping intoxication evidence away from the jury, where such evidence was relevant to establishment of the requisite mental state, violated the due process right to present a defense. [Citations.]" (*Egelhoff, supra*, 518 U.S. at p. 62 (dis. opn. of O'Connor, J.).)

The defendant in *Martin, supra*, 78 Cal.App.4th 1107 also relied on Justice O'Connor's dissenting opinion in *Egelhoff*. (*Martin, supra*, 78 Cal.App.4th at p. 1115.) The *Martin* court rejected the argument, and we agree that *Egelhoff* makes it clear that the California Legislature did not violate the Due Process Clause in enacting the 1995 amendment to section 22. "The 1995 amendment to section 22 results from a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their

burden to prove every element of the crime charged beyond a reasonable doubt, including, in this case, knowledge." (*Martin, supra*, 78 Cal.App.4th at p. 1117.)

We thus conclude section 22 is constitutional and defendant's due process right to present a defense to second degree murder was not violated by excluding evidence of voluntary intoxication to negate implied malice under section 22. (*Egelhoff, supra,* 518 U.S. at p. 50, fn. 4.)

3. Jury Instruction on the Defense of Unconsciousness Due to Voluntary Intoxication

Defendant contends the trial court erred in denying defendant's request for instruction on the defense of unconsciousness as a result of voluntary intoxication (CALCRIM No. 626). He argues that, by rejecting CALCRIM No. 626, the court failed to instruct the jury that it could find defendant guilty of the lesser included offense of involuntary manslaughter based on unconsciousness due to voluntary intoxication.

The trial court rejected CALCRIM No. 626 on the ground there was insufficient

evidence of unconsciousness due to intoxication.[3]

CALCRIM No. 626 is derived from sections 22 and 26. Section 22 provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes

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[3] CALCRIM No. 626 states: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions.

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter.

Involuntary manslaughter has been proved if you find beyond a reasonable doubt that:

1. The defendant killed without legal justification or excuse;

2. The defendant did not act with the intent to kill;

3. The defendant did not act with a conscious disregard for human life;

AND

4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions.

The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter)."

charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

Section 26 states in relevant part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Four—Persons who committed the act charged without being conscious thereof."

CALCRIM No. 626 does not provide a complete defense but rather a partial defense, in which a person who kills while unconscious due to voluntary intoxication, is guilty of involuntary manslaughter, rather than murder. (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424 (*Ochoa*).)

Here, the jury was instructed on involuntary manslaughter, but was not given CALCRIM No. 626 on unconsciousness due to voluntary intoxication. The trial court is required to instruct "on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) In the instant case there was insufficient evidence to support instruction on unconsciousness as a partial defense.

An unconscious act, as defined "within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717.) Unconsciousness "need not mean that the actor lies still and unresponsive: section 26 describes as '[in]capable of committing crimes . . . [¶] . . . [¶] . . . [p]ersons who *committed the act* . . . without being conscious thereof.' (Italics added.) Thus unconsciousness '"can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting."' [Citations.]" (*Ochoa, supra,* 19 Cal.4th at pp. 423-424.)

Defendant argues there was sufficient evidence supporting the instruction on unconsciousness. Such evidence, defendant asserts, included testimony by the police and paramedics who responded to the scene. Deputies Fredericks and Ponce testified that they encountered defendant while he was still inside his car, reportedly appearing dazed, and going in and out of consciousness. Deputy Ponce testified that upon arriving at the accident scene, he found three men in the car with their seatbelts on. No one was moving or conscious. Defendant was in the driver's seat. After about five minutes, when the paramedics arrived, defendant appeared to regain consciousness. He and the rear passenger were "falling in and out of consciousness." As the paramedics were removing defendant and Chavez from the vehicle and placing them on gurneys, Ponce overheard defendant say that Chavez was driving. But at the hospital, defendant told Ponce that he had been drinking all day and was the only one who drove the vehicle.

Fredericks's and Ponce's testimony does not provide sufficient evidence to support an instruction on unconsciousness since the testimony does not establish that defendant was unconscious at the time of, or right before, the car collision. The testimony pertains to defendant's condition after having just been in a fatal car collision, in which he survived but the passenger sitting next to him died. Certainly, one would expect him to be dazed from the collision and even unconscious as a result of the crash, as was Lopez, the rear passenger who also survived the crash. The evidence does not prove defendant's condition at or right before the collision.

Defendant also cites evidence that a few months after the accident he told Deputy Calkins during an investigative interview that, on the day of the accident, he had one shot of Tequila at a friend's house. Then he went to a night club with friends and drank around nine beers. Defendant told Calkins he did not remember being at the night club or much of anything that happened that night after leaving his friend's house. He said he thought he might have blacked out since he normally did not drink liquor and considered himself a "light-weight."

This evidence also is not sufficient to support an unconsciousness instruction. It merely indicates defendant did not remember anything after he went to the night club and drank numerous beers. It does not establish that he was actually unconscious at the time of the collision within the meaning of the Penal Code. Defendant's claim of memory loss alone is not sufficient to support instruction on unconsciousness due to voluntary intoxication. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418-419 (*Halvorsen*).)

As in the instant case, in *Halvorsen*, *supra,* 42 Cal.4th 379, there was evidence that around the time the defendant committed several murders, the defendant had drunk to excess with resultant memory losses. The *Halvorsen* defendant had spent the afternoon drinking at a bar, producing a blood-alcohol level estimated at .20 percent at the time of the shootings. (*Id.* at pp. 418-419.) In *Halvorsen,* the court concluded the record was "lacking in substantial evidence that defendant was not conscious of his criminal actions within the meaning of section 26, subdivision Four. Accordingly, the trial court did not err in failing to instruct on involuntary manslaughter on a theory of unconsciousness due to voluntary intoxication." (*Id.* at p. 419.)

Likewise, here there was no error in the trial court denying defendant's request for CALCRIM No. 626 on unconsciousness. There was insufficient evidence "deserving of consideration that the defendant was unconscious due to voluntary intoxication." (*Halvorsen*, *supra*, 42 Cal.4th at p. 418.)

Furthermore, there was evidence that defendant, in fact, was not unconscious. Defendant told Deputy Calkins after the accident that, at the time of the accident, he was driving to a casino in Indio to meet his wife and Chavez's girlfriend. Michael Geraghty, who followed defendant shortly before the collision, observed defendant make deliberative driving maneuvers, including turning into an apartment complex, causing Geraghty to lose sight of defendant. A little later, Geraghty saw defendant's car stop at an intersection and then turn right. Geraghty told the 911 operator that defendant briefly stopped and then sped away, "maybe because they saw me behind them." After Geraghty

again lost sight of defendant, Geraghty told the 911 operator he suspected defendant had noticed Geraghty following and tried to evade him.

In addition, Wendelyn Melton testified that right before the collision, she saw defendant's car run a red light, traveling at 60 to 70 miles per hour, eastbound on Fred Waring Drive. This also indicated defendant was conscious while driving at a high rate of speed toward his intended destination.

We conclude the trial court did not err in rejecting CALCRIM No. 626 on unconsciousness since there was insufficient evidence supporting the instruction.

4. Disposition

The judgment is affirmed.

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s/Hollenhorst
J.

We concur:

s/Ramirez
P. J.

s/Richli
J.